IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13/12/2002

CORAM

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

SECOND APPEAL NO.901 OF 1989
AND
CROSS OBJECTION

S.A.No.901/89.

Ethiraja Naicker ... Appellant/plaintiff

-Vs-

1.Krishnan
2.Subramanian
3.Audikesavan (died) ... Respondents/
Defendants 2 to 4

Appeal under Section 100 of Civil Procedure Code against the judgment and decree, dated 17.1.1989, rendered in A.S.No.58 of 1988 on the file of the Court of District Judge, Chingleput, modifying the judgment and decree, dated 24.3.1988, made in O.S.No.200 of 1982 on the file of the court District Munsif, Chingleput.

Cross Objection.

1.Krishnan
2.Subramanian ... Cross Objectors/
Defendants 2 & 3

vs.

1.Ethiraja Naicker ... Respondent No.1/
plaintiff
2.Audikesavan(died) ... Respondent No.2/
Defendant No.4
Cross Objection under Order 41 Rule 22 of Civil Procedure Code.

!For Appellant and ... Mr.T.r.Rajaraman for
Respondent No.1 in Mr.M.Mugundan
Cross Objection

^For Respondents and
Cross Objectors ... Mrs.S.Mala

:JUDGMENT

This second appeal is preferred against the judgment and decree, dated 17.1.1989, rendered in A.S.No.58 of 1988 on the file of District Judge, Chengalpattu. The plaintiff is the appellant herein.

2.The case of the plaintiff is briefly as follows. The plaintiff is the eldest son of defendant No.1 and defendants 2 to 4 are his other sons and they constitute a joint Hindu Family. The suit properties are undivided Hindu Joint Family properties of the plaintiffs and the defendants. Pending the suit, the first defendant died leaving behind the plaintiff and defendants 2 to 4 as his legal heirs. The plaintiff is entitled to 1/4th share and the defendants 2 to 4 are entitled each to 1/4th share in the properties. The joint family owned 60 goats, which multiplied in number and they were sold for good price. Later, rams were purchased by the joint family and they were sold and lands were purchased by defendant No.1 for the joint family. The plaintiff, who was employed in Forest Department, raised casuarina crop in plaint item 7 and it was sold and the money was utilised to discharge debts as well as to pay the purchase money for purchasing item 7 in the name of his mother. The plaintiff's sister Rukmani Ammal died about 20 years ago, issueless. The plaintiff and the defendants are her legal heirs and they are entitled to equal share. The plaintiff and the defendants, out of their own earnings and joint exertions, purchased several items of properties and they were treated as joint family properties.
The plaint 8th item of Punja land was purchased in the name of their mother Annapurani Ammal during the year 1963 for the benefit of the joint family and she died in the month of April, 1976. In fact, out of the joint family funds, a Well was sunk in that property and an Oil Engine was fixed. Plaint items 9 and 10 were purchased in the year 1970 in the name of defendants 2 and 3 by raising loan over plaint items 1 and 5 from Doraiswamy Naicker's son-in-law. Defendants 2 and 3 have no independent earnings and defendant No.4 is yet to be married. The plaintiff, though having a separate residence with his maternal uncle, the properties are in joint possession with the defendants and enjoyed as undivided Hindu Joint Family properties.
The defendants 2 and 3 took defendant No.1 to Sub-Registrar's Office at Thiruporur and created a fraudulent deed in their names by exercising undue influence and coercion on him with regard to plaint items. From that onwards, there was difference of opinion between the plaintiff and the defendants. There are sixty palmyrah trees in plaint item 9 and 5 coconut trees, 1 mango tree, 15 poovarasa trees and 1 palmyrah tree in plaint item 8 along with a Well. There are about two tamarind trees in plaint item 12. The Wells in the suit properties were sunk by the plaintiff and the defendants and they are in joint possession. The plaintiff is living in the suit property.
A sum of Rs.1,000/- has been lent out of the joint family funds to Venkataragavachari over his lands in S.No.249/2 in an extent of 0.18 cents and in S.No.249/3 in an extent of 0.76 cents and the plaintiff is also entitled to 1/4th share in that outstanding amount mentioned in 'B' schedule. There are moveables as well as jewels mentioned in 'C' schedule, in which, the plaintiff is entitled to 1/4th share. Inspite of demands, the defendants are not coming for an amicable sharing of the properties. Plaintiff issued a notice on 22.2.1977 and no reply was received from the defendants. Hence the plaintiff

has filed the suit seeking a preliminary decree for partition of his 1/4th share in the suit properties and for division of those properties by metes and bounds.

3.Defendant No.1, when he was alive, filed a written statement in the suit in which he contended as follows. There was no ancestral nucleus or properties to be inherited by him at the time of his father' s death. After the death of his father at Madras, defendant No.1 came to the suit village in his early years and settled there. He had no joint family property and out of his own exertion and hard work saved money by cultivating the lands of Krishnaswami Iyer of an extent of 2.00 acres on Waram basis. Later he cultivated the lands of Kuppa Iyer. Besides this, he and his wife, during "Karthigai" and festival days, used to sell 'pori' and 'avul' and out of that income, he purchased the properties in his own name for his own benefit. The mother of defendant No.1 purchased a house site in 1911, described as item No.11 in 'A' schedule, and defendant No.1 alone is entitled to that item. It is not the ancestral property. Later, defendant No.1 got assignment of item 12 on 7.12.1938 and it is his self acquisition.

On 30.6.1941, item No.1 was purchased by him from one Adilakshmi Ammal for Rs.175/-. On 27.6.1946, defendant No.1 purchased item No.6 for a sum of Rs.300/- under a registered sale deed. Defendant No.1 purchased plaint item No.3 for a sum of Rs.300/- from Thayarammal. Item No.2 was purchased by him for a sum of Rs.300/- from Sundarammal and another in 1947. In S.No.362/17, defendant No.1 purchased 0-17 cents under a registered sale deed, dated 25.11.1963 for a sum of Rs.10 0/- from Rangasawami, which is a portion of item No.8. In that item, defendant No.1 is entitled to only 0-17 cents and not 0-37 cents as stated in the plaint. Defendant No.1 purchased item No.4 for Rs.500/- on 4.10.1967 from Devarjan and another. The above acquisitions are the self acquisitions of defendant No.1. Defendant No.1 has no interest in item Nos.6,7 and 9 of 'A' schedule. Item No.6 is owned by defendants 2 and 3, who had purchased the same for a sum of Rs.1,600/- from Janaki Ammal. Plaintiff is not entitled to any share in those items and they are not joint family properties.

The averments in the plaint that the joint family had 60 goats, which multiplied in number and later rams were purchased and sold are denied. The averment that the plaintiff raised casuarina crop in item No.7 and its sale proceeds were utilised for discharge of debts as well as to purchase properties are denied. The further averment that the plaint item No.7 was purchased in the name of the mother by the plaintiff is not true. That item was purchased by defendants 2 and 3 out of their own funds for their benefit. None of the properties are joint family properties and they were never treated as such. Item No.8 is not owned by the family. No joint family fund was available for digging well or for improving it as alleged in the plaint. Item No.9 was purchased by defendants 2 to 4 benami in the name of their mother under a registered sale deed, dated 17.7.1964. Item No.10 was purchased by defendant No.3 with his own funds. Defendant No.1 was not taken to Sub-Registrar's Office to create a fraudulent deed by exercising undue influence or coercion upon him and no deed was executed. The trees mentioned in numbers are all exaggerated. Defendant No.1 advanced a sum of Rs.2,000/- to one Venkataraghavachari over S.No.249/2 and 249/3. There are no moveables. The existence of 'C' schedule property in the plaint is denied. No jewel is owned by defendant No.1. With the funds provided by defendant No.1, the

plaintiff constructed a house. In that house the plaintiff and the defendants are entitled to share. The suit is bad for non-joinder of that item. Plaintiff is residing separately since 1961 soon after his marriage and he is estopped from claiming any share in the suit properties.

4.Defendants 2 and 3 in their written statement, which was adopted by defendant No.4, have stated as follows. There is no joint family or joint family property as alleged by the plaintiff. The plaintiff and the defendants do not constitute Hindu Joint Family. The plaintiff is living separately from the year 1962 soon after his marriage and he is employed in Forest Department and he is having income of his own. The averment that the joint family owned goats and rams is not true and the further averments that their sale proceeds were utilised for the purchase of lands are not correct. Defendants 2 and 3 took on lease about 1-1/2 acres of land from one Venkataraghavan and others on 'Guthagai' basis and on festival days, defendaants 2 to 3 did business in 'avul' and ' pori' in Thiruporur where there used to be heavy pilgrim rush. Besides, defendants 2 and 3 used to cut casuarina trees on contract basis and they had their own income and from the savings, they purchased item No.9 in the name of their mother on 17.4.1964 for Rs.500/- and that item is exclusively owned by them. They have been in possession and enjoyment of that item even during the life time of their mother and she never claimed any title to it. On the contrary, she recognised the title of defendants 2 and 3 . The defendants have prescribed title by adverse possession by being in possession for more than a statutory period. Plaint item No.7, namely, 15 cents in S.No.412/18, is the 'Sridhana' property of their mother and the plaintiff and the defendants are each entitled to equal share. Defendants 2 and 3, out of their own income, purchased plaint item No.6 for a sum of Rs.1,600/- from Janaki Ammal under a registered sale deed and it is their exclusive property. Defendants 2 and 3 have no interest in the properties purchased by defendant No.1 out of his own funds. Item No.10 was purchased by defendant No.3 alone out of his own earnings for Rs.300/- on 14.7.1970 from Munuswami Naicker. Defendants 2 and 3 alone have advanced Rs.2,000/- to Venkataraghavachari in 1964 and the joint family did not advance any amount. The plaintiff is not entitled to any share in the suit properties.

5.In their additional written statement, which was adopted by defendant No.4, defendants 2 and 3 have contended that defendant No.l died in March, 1980 and while he was in sound disposing state of mind, he executed a registered will on 17.5.1978 bequeathing his properties to defendants 2 to 4 and they alone entitled to the properties bequeathed under the Will. The plaintiff is not entitled to any share. The Will was attested by Veerasami Naicker and A.Kothandam and it was presented for registration by the testator Manicka Naicker himself.

6.On the above pleadings, the trial court framed 15 issues and on a consideration of oral and documentary evidence granted a preliminary decree for partition of 1/4th share of the plaintiff in the entire suit properties as prayed for with costs. Aggrieved by the same, defendants 2 to 4 preferred appeal in A.S.No.58 of 1988 on the file of District Judge, Chengalpattu and the learned District Judge modified the judgment and decree of the trial court and granted a preliminary decree in favour of the plaintiff

only regarding his 1/4th share in Item Nos.7 and 9. Against the judgment of the lower appellate Court, the plaintiff has preferred the present second appeal and defendants 2 and 3 have preferred Cross Objection against the grant of preliminary decree in so far as item Nos.7 and 9 are concerned. When the second appeal was pending in this Court, the 3rd respondent Audikesavan died unmarried leaving behind him as his legal heirs only the appellant and respondents 1 and 2. The appellant filed petition in C.M.P.No.57 32 of 2002 seeking for amendment of the plaint claiming 1/3rd share in the suit properties. This Court, by order dated 12.6.2002, allowed the petition and the plaint was amended accordingly. For the sake of convenience, the parties are described as arrayed in the suit in this judgment.

7.At the time of admission of the Second Appeal, this Court framed the following substantial questions of law.
"1) Whether the properties in question are the joint family properties in which the plaintiff is entitled to a fourth share.
2) Whether the appellant was not entitled to urge before the learned District Judge the fact that the properties were joint family properties notwithstanding the fact that the said question had been negatived by the trial judge while granting partition.
3) Whether the plaintiff is not entitled to claim partition of item 11 as the same stood in the name of the 1st defendant's mother (paternal grand-mother).
4) Whether the learned District Judge was in error in stating that Ex.B.45, the Will, had been established without considering the circumstances under which the will propounded by the defendants, had been executed.
5) Whether all the properties ought to have been held to be joint family properties and that the plaintiff/appellant is entitled to a fourth share."

8.The suit properties are mainly agricultural lands and house sites. The plaintiff and defendants 2 to 4 are the sons of the deceased 1 st defendant. 1st defendant died pending the suit and after that, the plaintiff claim 1/4th share in the entire suit properties. At the time of filing of the suit, the 1st defendant-father was alive and he filed written statement contending that the suit properties are not joint family properties as contended by the plaintiff and except item Nos.6, 7 and 9, all other items are his self-acquisitions and the plaintiff is not entitled to any share. Defendants 2 to 4 in their written statement denied the claim of the plaintiff. After the death of the 1st defendant, they filed additional written statement stating that the 1st defendant executed a registered Will on 17.5.1978 bequeathing his properties in favour of defendants 2 to 4 and the plaintiff is not entitled to any share.

9.The onus is on the plaintiff to show that the suit properties are joint family properties. In the plaint he claims that the joint family owned 60 goats and they multiplied in number and some rams were purchased and they were also sold and the 1st defendant purchased the suit properties from that income. The plaintiff in his Ex.A-1 suit notice did not state that the joint family owned goats or rams. It is only in the plaint he has come up with this case. The 1st defendant-father purchased item No.1 of

the suit properties as early as in 194 1 in his own name. At that time, the plaintiff was aged only 5 years and there was no evidence adduced by the plaintiff to show that 1st defendant owned goats or rams and they were sold. Item Nos.2 to 5 were purchased under Exs.B-3 to B-7 sale deeds and item No.12 was purchased under Ex.B-8 sale deed. Item Nos.8 was also purchased by 1st defendant and all the properties stand in the name of 1st defendant. Exs.B-9 to B-11 pattas and Ex.B-13 kist receipt are also in his name. Item No.l1 was purchased by the mother of the 1st defendant and after her death, the 1st defendant got the property as her heir. It is not ancestral property. The above documents clearly show that the 1st defendant had purchased items 1 to 5, 8 and 12 in his own name. The 1st defendant mortgaged item No.1 to Sambanathan as per Ex. B-41 and under Ex.B-42 he has discharged the mortgage debt. From the above documents, it is clear that 1st respondent himself purchased the suit items and was in enjoyment thereof.

10.Defendants 2 and 3 have purchased the property in item No.6 out of their own income. They have let in evidence to show that they were having independent income. Admittedly, the plaintiff was employed in Forest Department and got married in the year 1961 and was living separately with his wife. There is no evidence adduced by the plaintiff to show that he contributed money towards the purchase of any of the above properties. In his testimony as P.W.1, the plaintiff has admitted that he has constructed a house of his own and that is not included in the suit property. Defendants 2 and 3 have shown that they purchased item No.6 out of their separate earnings.

11.The other item is item No.9 and it was purchased by Annapoornammal, the mother of the plaintiff and defendants 2 to 4, under Ex.B-33. The plaintiff as well as defendants 2 to 4 claim that the property was purchased in the name of mother as benami. Annapoornammal died in the year 1976. Though the plaintiff claims that the above purchase by the mother is a benami transaction, he has failed to prove the same. The courts below are right in concluding that item No.9 should be treated as property of Annapoornammal. Admittedly, item No.7 is the Sridhana property of mother Annapoornammal. From the evidence on record, it can be safely concluded that the suit properties are not joint family properties as contended by the plaintiff and as rightly held by the courts below.

12.Defendants 2 to 4 claim the properties of the 1st defendant based on Ex.B-45 registered Will executed by him on 17.5.1978. For proving the Will, defendants have examined D.W.2, who is said to be the attestor to the Will. D.W.2 Veerasamy is a resident of Illalur Village where the deceased 1st defendant owned lands. He is aged 74 years and is a temple archaka by profession. According to D.W.2, the Will was written at the house of Rathinasabapathy in Tirupporur and the 1 st defendant affixed his thumb impression in the last page and 'kiral' in other pages. Mr.T.R.Rajaraman, learned counsel for the appellant, contended that the signatures of the testator and the attestors are not identified and the Will is not proved as required under Section 63 of the Indian Succession Act and he relied on the decision of this Court in Govindan Chettiar, etc. vs. Akilandam @ Seethalakshmi and 24 others, reported in 1997-3-L.W. 673. In the above decision, S.S. Subramani,J has held that when the signatures of the testator

and the attestors are not identified, it cannot be said that the Will is properly proved.

13.In the present case, it has to be seen as to whether the legal requirements under Section 63 of the Indian Succession Act are complied with. D.W.2 has stated that at the time of execution of Ex.B-45 Will, Rathinasabapathy gave the pen to the 1st defendant and the 1st defendant touched the pen which was seen by him and the other witness Kothandam and 'kiral' was made with identification and the 1st defendant put his thumb impression since he could not sign due to hand shivering and he put his signature as a witness and Kothandam also put his signature as other witness. The learned counsel for the appellant contended that the 1st defendant filed his written statement in the suit on 20.4.1978 and in it he has signed and within a month Ex.B-45 is alleged to have come into existence, in which, only left hand thumb impression is found and hence there is every suspicion asto whether the 1st defendant executed the alleged Will. It is true that Ex.B-4 5 Will has come into existence within a month after the filing of written statement by the 1st defendant. A perusal of the written statement filed by the 1st defendant shows that 1st defendant had put his signature as well as his left hand thumb impression in it. The signature in it appears very shaky and only because of that the 1 st defendant has taken care to put his left hand thumb impression also in it. Hence it is clear that the 1st defendant was not in a position to put his signature clearly at the time of filing written statement. D.W.2 categorically states that the hand of the 1st defendant was shivering due to old age and he could not sign and hence he affixed his thumb impression in EX.B-45 Will in his presence. There is no suspicious circumstance in it as contended.
14.The learned counsel for the appellant pointed out some sentences in the cross-examination of D.W.2 and contended that the Will is not properly proved. The testimony of a witness has to be looked into as a whole for the purpose of appreciation. D.W.2 has specifically stated that he signed as a witness in Ex.B-45 Will and he and the other attesting witness saw the 1st defendant touching the pen when the ' kiral' was made and they attested the Will at that time and the Will was registered next day at the Registrar's office. D.W.2 is an independent witness and his evidence is natural, convincing and trustworthy and deserves acceptance. From his testimony, it is clear that the legal formalities stipulated under Section 63 of the Indian Succession Act have been satisfied and the contention raised by the learned counsel for the appellant in this regard is devoid of merit.

15.There are no suspicious circumstances regarding the execution of the Will. The 1st defendant contested the claim of the plaintiff for partition on the ground that the properties are self-acquired properties. In Ex.B-45 Will, the 1st defendant has stated that he got employment for the plaintiff in the Forest Department and after marriage, the plaintiff is residing separately and he has acquired properties and there is no help to the family from him and whereas defendants 2 to 4 are living with him and maintaining him and hence he is bequeathing his self-acquired properties to them in equal shares. The testator has thus stated the reasons for disinheriting the plaintiff in so far as his self-acquired properties are concerned.

16.The learned counsel for the respondents contended that the plaintiff never contested Ex.B-45 Will, pleading its invalidity when the defendants had propounded the Will in their additional written statement and even during the oral testimony of witnesses examined by the defendants, nothing was put to the witnesses about the correctness of the Will and hence the Will has been proved and she relied on the decision of the Supreme Court in P.P.K.Gopalan Nambiar vs. P.P.. Balakrishnan Namibar and others, reported in 1995(2) MLJ (SC) 87. The Apex Court, in the above decision, held as follows.

"4. ..... Admittedly, the will was executed and registered on 1.1 1.1955 and she died 8 years thereafter in the year 1963. When the appellant had propounded the will in his written statement, nothing prevented either the respondent or any of the contesting defendants to file a rejoinder i.e., additional written statement with leave of the court under O.8, Rule 9 pleading the invalidity of the will propounded by the appellant. Nothing has been stated in the pleadings. Even in the evidence when the appellant was examined as D.W.1 and his attestor was as D.W.2, nothing was stated with regard to the alleged pressure said to have been brought about by the appellant to execute the will. In the cross-examination by the first respondent, no attempt was even made to doubt the correctness of the will.

5. Under these circumstances, the suspicion excited the mind of the District Munsif is without any basis and he picked them from his hat without fact-foundation. The Subordinate Judge had rightly considered all the circumstances and upheld the Will. The High Court, without examining the evidence, by merely extracting legal position set out by various decisions of this Court has upset the finding of the fact recorded by the Subordinate Judge in one sentence. It is trite that it is the duty of the propounder of the will to prove the will and to remove all the suspected features. But there must be real, germane and valid suspicious features and not fantasy of the doubting mind."

17.In the present case, defendants 2 to 4 filed additional written statement on 19.2.1983, in which they have propounded Ex.B-45 Will executed by the 1st defendant. The plaintiff has not chosen to file any reply statement pleading the invalidity of the Will. Nothing has been stated in the pleadings. In his testimony, P.W.1 states he knew about the Will executed by his father after filing of the suit and in the Will the father has bequeathed his properties on defendants 2 to 4 and has directed 1/4th share to be given to him in the properties of his mother. Even in the cross examination of D.W.1 and D.W.2, no attempt was made by the plaintiff to doubt the correctness of the Will. In such circumstances, there are absolutely no suspicious features in the execution of Ex.B-45 Will and there is enough evidence to conclude that Ex.B-45 Will was executed by the 1st defendant in a sound state of mind and the Will is true, legal and valid. The substantial questions of law are answered accordingly.

18.In view of the above finding, the plaintiff is not entitled to any share in the properties stood in the name of the 1st defendant as well as defendants 2 to 3. It is already decided that item Nos.7 and 9 belonged to the mother of the plaintiff, namely, Annapoornammal and after her demise, the plaintiff is entitled a share in those properties alone, as legal heir and the

conclusion of the lower appellate court is correct and no interference is called for. As per the amended plaint, the plaintiff is entitled to 1/3rd share in Item Nos.7 and 9. There are no merits in the cross objection filed by defendants 2 and 3.

19.In the result, the appellant/plaintiff is granted a preliminary decree for partition with regard to his 1/3rd share in item Nos.7 and 9 in the 'A' schedule of the suit properties and the judgment and decree of the lower appellate court is modified accordingly. The second appeal is allowed to the extent indicated above. Cross Objection is also dismissed. In the circumstances of the case, there shall be no order as to costs.

Index:yes.
Internet: yes.
gb.

To:

1.The District Judge,
Chengalpattu.

2.The District Munsif,
Chengalpattu.

3.The Record Keeper,
V.R.Section, High Court,
Chennai-104.